Supreme Court, U.S.
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No. 97-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL, etc., et al.,
Petitioners.

v.

ROCHAMBEAU WINES AND LIQUORS, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State has a right of action in a federal court to enforce the prohibitions of the Webb-Kenyon Act, 27 U.S.C. § 122, against a direct foreign seller of alcoholic beverages whose direct sales to the State violate that State's laws, the Twenty-First Amendment to the United States Constitution and the Webb-Kenyon Act?

PARTIES TO THE PROCEEDINGS

The Petitioners in this case, Appellants below, are the State of Florida, Department of Business and Professional Regulation, and Robert A. Butterworth, Attorney General of the State of Florida. The Respondents in this case, Appellees below, are Rochambeau Wines and Liquors, The California Wine Club, Passport Gift Company, Inc., d/b/a Passport Wine Club, and, Wine Club Santa Ana.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES .....

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

A. THE STATES' ABILITIY TO REGULATE THE INTERSTATE SHIPMENT OF ALCOHOLIC BEVERAGES HAS BEEN GREATLY UNDERMINED BY THE DECISION BELOW 8

B. STATES HAVE HISTORICALLY HAD ABSOLUTE REGULATION OF THE SALE, MANUFACTURE AND DISTRIBUTION OF ALCOHOLIC BEVERAGES WITHIN THEIR BOUNDARIES 10

1. PRE WEBB-KENYON 11

2. THE WEBB-KENYON ACT 27 U.S.C. § 122 13

3. PROHIBITION 15

4. THE 21ST AMENDMENT TO THE U.S. CONSTITUTION 17

C. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS 20

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 11

Brown-Foreman Distillers v.
New York State Liquor Authority,
476 U.S. 573 (1986) 11

California Retail Liquor Dealers
Association v. Midcal Aluminum,
445 U.S. 97 (1980) 19

California v. LaRue,
409 U.S. 109 (1972) 17

California v. Washington,
358 U.S. 64 (1958) 19

Clark Distilling Company v.
Western Maryland Railway Company,
242 U.S. 311 (1917) 10,14,15

Craig v. Boren,
429 U.S. 190 (1976) 17

Department of Business and Professional Regulation
v. Sam's Wines & Liquors, 2nd Judicial Circuit Court,
Case No. 96-3602, Amended Order Granting Motion
to Dismiss, dated December 8, 1997 7

Hostetter v. Idlewild Bon Voyage Liquor Corporation,
377 U.S. 324 (1964) 11,19

In re Palliser, 136 U.S. 257 (1890) 21

In the License Cases,
46 U.S. (5 How.) 504 (1847) 11,12

Indianapolis Brewing Co. v. Liquor Commission of Michigan, 305 U.S. 391 (1939) 17

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) 11,19

Leisy v. Hardin, 135 U.S. 10 (1890) 12

McCormick & Co. v. Brown, 286 U.S. 131 (1932) 15,16

National Prohibition Cases, 253 U.S. 350 (1920) 15

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 20

North Dakota v. United States, 495 U.S. 423 (1990) 19

Rhodes v. Iowa, 170 U.S. 412 (1898) 13

Scott v. Donald, 165 U.S. 58 (1897) 13

Seaboard Air Line Railway v. State of North Carolina, 245 U.S. 298 (1917) 15

State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1939) 17

United States v. Lanza, 260 U.S. 377 (1922) 15,16

United States v. Thayer, 209 U.S. 39 (1908) 21

West Virginia v. Adams Express Co., 219 F. 794 (4th Cir. 1915) 20,21,22

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 18,19

UNITED STATES CONSTITUTION

Commerce Clause 11,12,13,14,15,16,17,19

18th Amendment 15,16,17

21st Amendment i,iii,2,3,4,8,9,11,17,18

FEDERAL STATUTES

The Wilson Act,
27 U.S.C. §121 2,4,12,13,21

The Webb-Kenyon Act,
27 U.S.C. §122 ..... iii,2,3,4,8,9,11,13,14,15,16,17,22,23

The Collier Act,
49 Stat. 877 17

28 U.S.C.§ 1254(1) 2

28 U.S.C. §1331 3

28 U.S.C. §1337(a) 3

49 Cong. Rec. 699, 62 Cong. 3d Sess. (1913) 14

FLORIDA STATUTES

Chapters 561 through 568 6

Section 20.165(2)(b) 5

Section 561.02 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The State of Florida, Department of Business and Professional Regulation, and Robert A. Butterworth, Attorney General of the State of Florida, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals. Pet.App. i-xvii, is reported at 125 F.3rd 1399. The opinion of the district court, an unreported decision, is Pet.App. xviii-xxvi.

JURISDICTION

The court of appeals filed its opinion on October 24, 1997. Pet.App. i-xvii. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Twenty-First Amendment, Section 2, to the United States Constitution, provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violations of the laws therein, is hereby prohibited."

2. The Wilson Act, 27 U.S.C. §121, provides:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids had ben produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

3. The Webb-Kenyon Act, 27 U.S.C. §122, provides:

> The shipment of transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any

kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof is hereby prohibited.

4. 28 U.S.C. §1331, provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

5. 28 U.S.C. §1337(a), provides:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade or commerce against restraints and monopolies.

STATEMENT OF THE CASE

Petitioners brought this case in the District Court for the Northern District of Florida, in order to seek injunctive relief to halt the illegal interstate bootlegging of alcoholic beverages into Florida. The Petitioners brought the action under the federal jurisdictional statutes of 28 U.S.C. §1331 and 28 U.S.C. §1337(a). Petitioners asserted that the Webb-Kenyon Act, 27 U.S.C. §122, and the 21st Amendment to the United States Constitution, provided the Petitioners with an injunctive/ enforcement right of action in the federal courts. Petitioners asserted that this injunctive/enforcement right

provided the Petitioners with a federal forum to totally prohibit the interstate commerce of alcoholic beverages not in compliance with Florida law as permitted by the Wilson Act, the Webb-Kenyon Act and the 21st Amendment.

The Respondents filed a motion to dismiss in response to the Petitioners' complaint. Respondents raised a number of questions in their assertion that the Petitioners had not "raise a federal question" in their Complaint. The questions raised were: 1) did the Petitioners fail to assert a federal claim on the face of the Complaint, as opposed to a purely state law claim?; and, 2) did the federal laws under which the Petitioners claim a federal question arises provide the Petitioners with a federal right of action permitting a claim for relief in Federal Court?

The District Court set a hearing on the Respondents' Motion. Prior to the hearing, Petitioners filed supplemental authority in support of their position. Respondents later filed a response to Petitioners' supplemental authority. The District Court issued its ruling on May 3, 1996 granting Respondents' Motion to Dismiss for lack of subject matter jurisdiction. Pet. App. xvi-xxv. Final judgment dismissing the case was filed the same date. Pet. App. xxvi. Petitioners timely filed their Notice of Appeal.

On appeal, the Court of Appeals for the Eleventh Circuit, agreeing with the District Court, ruled that the Petitioners did not have an implied federal cause of action under the Webb-Kenyon Act.

The Respondents, out of state mail-order shippers, have been and are illegally selling alcoholic beverage products (hereinafter products) directly to Florida consumers, contrary to Florida law. Rochambeau Wines and Liquors (hereinafter

ROCHAMBEAU), is incorporated in and holds an alcoholic beverage license from the State of New York. Its principal place of business is at 389 Broadway, Dobbs Ferry, New York 11052, and it conducts mail-order business using telephone number (914) 693-0034. The California Wine Club (hereinafter CALIFORNIA) is incorporated in and holds an alcoholic beverage license from the State of California. Its principal place of business is at 2175 Goodyear Avenue, Suite 114, Ventura, California 93003. Passport Gift Company, Inc., d/b/a Passport Wine Club (hereinafter PASSPORT), is incorporated in and holds an alcoholic beverage license from the State of California. Its principal place of business is at 1201 Andersen Drive, Suite M, San Rafael, California 94901-9801 and it conducts mail-order business using telephone number (800) 867-9463. Wine Club Santa Ana (hereinafter SANTA ANA), is incorporated in and holds an alcoholic beverage license from the State of California. Its principal place of business is at 2110 East McFadden Avenue, Suite E, Santa Ana, California 92705. SANTA ANA conducts its mail-order business using telephone number (800) 966-5432.

The Division of Alcoholic Beverages and Tobacco (DABT) is a division of the Florida Department of Business and Professional Regulation of the State of Florida, created pursuant to Sections 20.165(2)(b) and 561.02, Florida Statutes (1994). DABT is charged with the enforcement of the Beverage Law. Section 561.02, Florida Statutes (1994).

Respondents engage in the retail sale of wine products. Respondents have created "clubs" and sell "memberships" to the members of the public. Respondents conduct their retail activities by selling to persons who become members of the

"club." These sales and deliveries of the wine products are conducted via "mail-order." The Respondents advertise their "club" memberships over the Internet, in publications, or via direct mail, distributed in Florida. These advertisements in no manner restrict the sale or delivery to persons residing within the territorial boundaries of Florida.

Through this just-described activity, Respondents are illegally selling, and bootlegging, alcoholic beverages in Florida. The Respondents are not licensed in Florida to sell their merchandise in Florida or to Florida residents directly. This advertising and absence of controls, to ensure legal sale, delivery and tax collection in this State, results in unlawful transactions involving alcoholic products and the evasion of lawful taxes imposed by Florida on alcoholic beverages lawfully sold in Florida.

On or about May 16, 1995, DABT provided written notice to each of the Respondents, via certified mail, return receipt requested, advising them that their mail-order shipment of alcoholic beverage products to Florida consumers was illegal. In the letter, DABT's Director offered to assist each Respondent to operate in compliance with Florida's Beverage Law. Each Respondent received this written notice and offer of assistance as evidenced by the signatures on the return postal receipts.

On or about July 28, 1995, an agent of DABT placed a telephone order from Leon County, Florida, with Respondents SANTA ANA and ROCHAMBEAU, to receive a mail-order shipment of products. The products were subsequently delivered directly to a consumer's residence in Leon County, Florida. The products were not registered in Florida. On or about September 11-12, 1995, an agent of

DABT placed a telephone order from Leon County, Florida, with Respondents CALIFORNIA and PASSPORT to receive a mail-order shipment of products. The products were subsequently delivered directly to a consumer's residence in Leon County, Florida. The products sold by Respondents CALIFORNIA and PASSPORT were not registered in Florida. None of the alcoholic products sold reflected the taxes lawfully imposed by Florida.

DABT contacted each of the known Respondents in an effort to get them to comply with the Florida "Beverage Law." (Chapters 561 through 568, Florida Statutes) However, the Respondents neither ceased from selling and shipping products into Florida nor responded to certified notification.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals strikes a crippling blow to law enforcement efforts in stopping the illegal flow of alcohol into Florida and other States. The Court of Appeal's ruling locks the Federal Courthouse doors to the States. The States are without a forum to invoke the Webb-Kenyon Act to stop illegal shipments of liquor.[1/]

[1/] About the same time the Court of Appeals was closing the federal courthouse door to Florida, a Florida state court judge ruled that Florida did not have "personal" jurisdiction over a like seller of alcohol to prevent, in a Florida state court, the illegal shipment of alcohol into Florida. Department of Business and Professional Regulation v. Sam's Wines & Liquors, 2nd Judicial Circuit Court, Case No. 96-3602, Amended Order Granting Motion to Dismiss dated December 8, 1997, appeal pending before the First District Court of Appeal of Florida,

Two of the cornerstones of the law enforcement effort in the prohibition of illegal interstate shipment of alcoholic beverages have been the 21st Amendment to the United States Constitution and the Webb-Kenyon Act, 27 U.S.C. § 122. Both have been viewed by the States and the Federal Government as the laws by which the States could stop the illegal shipment of alcoholic beverages into their respective states. The States believed they can utilize the Webb-Kenyon Act in either State or Federal courts to stop the illegal flow of unregulated, unlicensed and untaxed alcoholic beverages over their borders. That was until now.

A. THE STATES' ABILITY TO REGULATE THE INTERSTATE SHIPMENT OF ALCOHOLIC BEVERAGES HAS BEEN GREATLY UNDERMINED BY THE DECISION BELOW

What has been brought into question in this case is the ability of Florida, and the other States, to utilize the Federal Courts as a forum for the enforcement against the illegal shipment of alcoholic beverages into their respective States. The essence of the Court of Appeal's decision is that, while the States may enforce Webb-Kenyon in their own courts, they may not use the Federal Courts to enforce this Federal

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Consolidated Case No. 97-3828, 97-3937 and 97-4060. Pet App. xvii-xxx. After the District Court's decision in this case, the Petitioners had brought the state court enforcement action against other direct marketers, who like the Respondents, illegally sold alcoholic beverages directly to Florida residents. Consequently, Florida knows who is illegally selling and shipping alcoholic beverages to Florida residents but is now without a forum within which to enforce its Beverage Laws to stop such illegal sales.

Act.

The Petitioners submit that the Court of Appeals ruling that the Webb-Kenyon Act does not provide a cause of action to the States to utilize the Federal Courts to halt the clearly illegal interstate shipment of alcoholic beverages into the States eviscerates the intent of Congress and greatly hampers the State's law enforcement capabilities. In conjunction with the State court ruling that Florida does not have "personal jurisdiction" over the Respondents, Florida is left without any forum to reach those beyond its borders who are purposefully violating not only Florida's Beverage Laws, but also the 21st Amendment and the Webb-Kenyon Act.

The Petitioners believe the Court of Appeals did not understand the import of the situation and read too narrowly this Court's private right of action case law when the State's right of action would involve a law enforcement effort and, in particular, the enforcement of an act of Congress. There is no question that Respondents' business activities in this case violate Florida's beverage laws. There is no question that the 21st Amendment makes the violation of the State laws a violation of the Constitution. Furthermore, the violation of the state beverage laws is prohibited under the Webb-Kenyon Act. There is no question that the Respondents have violated both the 21st Amendment and the Webb-Kenyon Act.

The result of the Court of Appeal's decision is that Florida has before it a clear violation of its and Congress' laws yet Florida has no federal, and maybe no State, forum to enforce those prohibitions. By the mere ability to engage in commerce long distance and without the commercial infrastructure that was required for many years, the States have lost their ability to have practical enforcement of its

alcoholic beverage laws.

The Respondents are foreign corporations that have no physical locations in Florida. Respondents use commercial shippers like United Parcel Service (UPS) and Federal Express (FedEx) to ship their products to Florida and the other States. Respondents claim they are immune from reach so the States had better target UPS and FedEx since they possess the illegal alcohol inside of the States. The obvious conclusion is that it is up to the States to stop and search each and every truck, train or airplane to see if it contains illegal alcohol.

But does UPS or FedEx even know that? Some shippers of alcoholic beverages already mask what is contained in the shipping cartons. Sellers of alcoholic beverages can easily go to a general shipping agent, like Mail Boxes, Etc., and have their packages wrapped and picked up by UPS. Florida even knows of some companies which have been set up strictly to ship alcoholic beverages and mask the true identity of the contents to the shipping company.

B. STATES HAVE HISTORICALLY HAD ABSOLUTE REGULATION OF THE SALE, MANUFACTURE AND DISTRIBUTION OF ALCOHOLIC BEVERAGES WITHIN THEIR BOUNDARIES

Only two "parties" have historically ever had the power to regulate the manufacture, sale, transportation and use of alcoholic beverages: the United States Government and the Fifty States. Congress has long maintained the power to regulate the trade of liquor (i.e. Prohibition; tax laws; Alcohol, Tobacco & Firearms). Clark Distilling Company v. Western Maryland Railway Company, 242 U.S. 311 (1917).

This Court has long held that the enactment of the 21st Amendment did not totally divest Congress of its interstate commerce powers in the regulation of alcoholic beverages. See, e.g., Brown-Foreman Distillers v. New York State Liquor Authority, 476 U.S. 573, 584 (1986); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 41-42 (1966); Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 331-333 (1964). Thus, the United States still maintains considerable power over the regulation of alcoholic beverages.

The only question is whether there has been an alteration of the Commerce Clause by the 21st Amendment, or an act of Congress, to allow state regulation of the interstate shipment of alcoholic beverages? As the following will clearly show, the enactment of the 21st Amendment and the Webb-Kenyon Act gave to the States very powerful weapons to stop the illegal flow of alcoholic beverages into the States without the restrictions the Commerce Clause would normally place on the States' regulation of interstate commerce. Now the use of these laws is threatened.

1. PRE WEBB-KENYON

From the very beginnings of the United States, it was thought to be common knowledge that the regulation of alcoholic beverages was a matter of state concern and such state regulation, even total bans or criminal prosecutions, was thought to be consistent with, and not violative of, the Commerce Clause to the U.S. Constitution. The early major case was that of In the License Cases, 46 U.S. (5 How.) 504

(1847)[2]/. There, this Court recognized the power of the states to regulate alcoholic beverages within their boundaries without restriction from the Commerce Clause. Id., at 579, 586.

However, the long held belief of state regulation changed with this Court's decision of Leisy v. Hardin, 135 U.S. 10 (1890). There, this Court retreated from its earlier position holding instead that no product, no matter how dangerous, could be regulated by the states without approval by Congress.

Within months of Leisy, Congress reacted by enacting the Wilson Act, 27 U.S.C. § 121. The Wilson Act, 27 U.S.C. § 121, states:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

It was thought that this law would reverse Leisy and allow the state to prevent shipment into the States.

However, this Court then ruled that states could not prevent the interstate shipment of alcoholic beverages directly to private customers for personal use; the right to

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[2]/ This in fact consisted of a series of cases addressing alcoholic beverages.

receive alcohol was not affected by the Wilson Act. See, Rhodes v. Iowa, 170 U.S. 412 (1898). The legislation of many states passed to prevent shipment of alcohol into their states were held void as in conflict with the Commerce Clause as the states could not interfere with the importation of liquor until it reached its destination.[3/]

2. THE WEBB-KENYON ACT, 27 U.S.C. § 122

Next came the Webb-Kenyon Act, 27 U.S.C. §122, enacted March 1, 1913. The title of the Act as passed was "An act divesting intoxicating liquors of their interstate character in certain cases." 37 Stat. 699. The Webb-Kenyon Act, states, in pertinent part,:

> The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State * * * into any other State, * * * which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State * * * **is hereby prohibited.** (e.s.)

This act was a further diminution to the states of the constitutional power of Congress to solely regulate interstate commerce in intoxicating liquors. Under the Webb-Kenyon Act the shipment or transportation in any manner or by any means of any spirituous or intoxicating liquor from one state to another to be disposed of in violation of any law of such

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[3/] It was the ground of the majority opinion of Scott v. Donald, 165 U.S. 58 (1897), that the state laws discriminated between liquors produced in the state and those produced outside of the state.

state is prohibited. Each state is left free to enact such laws relating to the traffic in intoxicating liquor as it may desire.[4/]

While many questions arose over the Webb-Kenyon Act, including its constitutionality, one of the points raised was the effect Webb-Kenyon had on the Commerce Clause and the states' regulation of liquor. The leading case first interpreting the Webb-Kenyon Act was Clark Distilling Company v. Western Maryland Ry. Co., 242 U.S. 311 (1917). The case involved a legislation act of West Virginia which forbade all shipments of intoxicating liquor into the state whether for personal use or otherwise. The distilling company offered for transportation into the state a shipment of intoxicating liquor which the defendant railway refused to accept and the plaintiff brought its action for damages.

In response to the argument that the Commerce Clause prevailed, this Court held that the Webb-Kenyon Act operated to give effect to the prohibition of the West Virginia law in respect to liquors shipped into the state for personal use by withdrawing from such shipments the immunity of interstate commerce and to forbid the shipment or transportation into the state of liquors intended to be received or possessed there for personal use contrary to such state

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4/ Webb-Kenyon, in its original drafted form, contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state products. See 49 Cong.Rec. 699, 62 Cong. 3d Sess (1913). However, in the act as finally passed the restrictive language does not appear. Its omission seems important. It shows an intent to give the states an entirely free hand in regulating the importation and transportation of liquor.

prohibition. Clark Distilling 242 U.S., at 322-325. It was further held that the Webb-Kenyon Act was a legitimate exercise of the power of Congress under the Commerce Clause, and that power, in the case of intoxicants, because of their character extends to the total prohibition of their transports in interstate commerce, and necessarily includes the lesser power exercised in the Webb-Kenyon Act of adapting the regulation to the various local requirements and conditions that may be expressed in the laws of the state. Clark Distilling 242 U.S., at 325-332.

Thus, Clark Distilling was the first of a series of cases that held that the effect of Webb-Kenyon was to remove the regulation of alcoholic beverages from the restrictions of the Commerce Clause. See, e.g. Seaboard Air Line Railway v. State of North Carolina, 245 U.S. 298 (1917); McCormick & Co. v. Brown, 286 U.S. 131 (1932).

3. PROHIBITION

The wave of temperance lead to what some historians have called the "great experiment," the total prohibition of alcoholic beverages. The 18th Amendment to the Constitution, effective January 16, 1920, was passed to so prohibit sales of liquor. The 18th Amendment did not take away the police power of the state to enforce its provisions by appropriate legislation. Section 2 of the Amendment provides that: 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.' National Prohibition Cases, 253 U.S. 350, (1920); United States v. Lanza, 260 U.S. 377 (1922). In Lanza, Chief Justice Taft said:

> To regard the amendment (18th) as the source of the power of the states to adopt and enforce prohibition

> measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded.

The question arose whether the 18th Amendment repealed Webb-Kenyon. This Court held that it did not in McCormick & Co. v. Brown, 286 U.S. 131 (1932). McCormick & Co. was a suit brought by nonresident manufacturers and wholesale dealers to restrain state officers of West Virginia from requiring the complainants to obtain permits from the state commissioner of prohibition and to pay an annual license fee of $50 before shipping certain products containing alcohol into the state to purchasers there for resale. The bill charged that the requirements of the state officers, purporting to act under state legislation, constituted an interference with interstate commerce in violation of the Commerce Clause of the Federal Constitution, and that the complainants were without remedy at law.

This Court reaffirmed the purpose of Webb-Kenyon, and, after holding that the Webb-Kenyon Act was still in force, said:

> As the prohibitory legislation of the states may thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application **to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the states'** valid prohibitions. (e.s.)

McCormick & Co., 286 U.S., at 141.

4. THE 21ST AMENDMENT TO THE U.S. CONSTITUTION

In 1933, this "noble experiment" was ended with the ratification of the 21st Amendment. The 21st Amendment consisted of three sections. Section 2, of the Twenty-First Amendment, adopted December 5, 1933, reads as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

At about the same time Webb-Kenyon was reenacted in 1935 without any change. The Collier Act, 49 Stat. 877.

By this wording, Section 2, of the 21st Amendment, constitutionalized an exception to the normal operation of the Commerce Clause. Craig v. Boren, 429 U.S. 190, 206, (1976). As this Court has stated, that section is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product: intoxicating liquors. See California v. LaRue, 409 U.S. 109, 115 (1972).

Shortly after the repeal of Prohibition, the question of its effect on state power arose. This Court stated that the 21st Amendment permitted states to regulate without fear of the Commerce Clause. State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1939); Indianapolis Brewing Co. v. Liquor Commission of Michigan, 305 U.S. 391, 394 (1939)[Since the 21st Amendment, "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"]. In Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939), this Court had before it a

challenge to the beverage laws of Kentucky. To paraphrase this Court,

> since March 1933 appellant, an Indiana corporation, has continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. It has permission under the Federal Motor Carrier Act, 1935, to operate as a contract carrier, and claims the right to transport whiskey as heretofore, notwithstanding inhibitions of the Kentucky Alcoholic Beverage Control Law approved March 7, 1938. By this proceeding it seeks to restrain officers of [Kentucky] from enforcing the contraband and penal provisions of that enactment.
> The bill charges that to enforce the Control Law would impair appellant's rights under the Commerce Clause, Federal Constitution, U.S.C.A.Const. art. 1, s 8, cl. 3, and deprive it of the Due Process and Equal Protection guaranteed by the Fourteenth Amendment.
> The Statute is a long, comprehensive measure (123 sections) designed rigidly to regulate the production and distribution of alcoholic beverages through means of licenses and otherwise. The manifest purpose is to channelize the traffic, minimize the commonly attendant evils; also to facilitate the collection of revenue. To this end manufacture, sale, transportation, and possession are permitted only under carefully prescribed conditions and subject to constant control by the state. Every phase of the traffic is declared illegal unless definitely allowed. The property becomes contraband upon failure to observe the statutory requirement and whenever found in unauthorized possession.

Ziffrin, Inc.,308 U.S., at 133-134.

This Court, after a detailed statement of the facts, stated the now long held effect of the 21st Amendment:

> The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, **unfettered by the Commerce Clause**. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their

> transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.
>
> Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions. Former opinions here make an affirmative answer imperative. The greater power includes the less. The state may protect her people against evil incident to intoxicants, and may exercise large discretion as to means employed. (e.s.)

Ziffrin, Inc., 308 U.S., at 138-139 (citations omitted).

When it comes to the state regulation of the sale, manufacture, transportation or use of alcoholic beverages within the boundaries of the state, this Court has **not** wavered from Ziffrin, state regulation of liquor is not limited by the Commerce Clause. California v. Washington, 358 U.S. 64 (1958); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964); Joseph E. Seagram & Sons, Inc v. Hostetter, 384 U.S. 35, 42 (1966); California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 110 (1980)["The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."]; North Dakota v. United States, 495 U.S. 423 (1990)[same]. The states have the "absolute power under the twenty-first amendment to prohibit totally the sale of liquor within its boundaries...." New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715(1981).

C. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS

The Petitioners would assert that the decision below conflicts with the Fourth Circuit Court of Appeals decision of West Virginia v. Adams Express Co., 219 F. 794 (4th Cir. 1915). That case is nearly identical to this case on the facts. In Adams Express, a citizen of West Virginia purchased beer from a seller in Cincinnati, Ohio, and had the Cincinnati seller directly ship the beer to the West Virginia citizen using Adams Express. West Virginia sought to stop this illegal trade into West Virginia by bringing suit in state court against Adams Express to enjoin the transportation of the unlawful alcohol.[5/] The state court enjoined Adams Express which then removed the case to the Federal District Court. The district court dissolved the injunction and then dismissed the suit. The appeal to the Fourth Circuit then ensued.

The Fourth Circuit stated the two issues before it as whether:

> the state may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the

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[5/] The only factual difference between these two cases is that Florida wanted to directly stop the seller from violating the law where West Virginia sought to stop the trade by suing Adams Express, the shipping agent.

state.[6]/

Id., 219 F., at 797. That court believed both questions were to be answered in the affirmative. Id.

The Fourth Circuit first found that the Wilson Act, 27 U.S.C. § 121 withdrew the protection of interstate commerce from liquor. Adams Express, 214 F., at 810. It then ruled that the Webb-Kenyon Act was enacted as the result of a

> growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill **liquor dealers in one state were protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage.** (e.s.)

Id. Thus, the Fourth Circuit concluded Webb-Kenyon:

> [P]rohibits the shipment or transportation of liquor from one state into another, not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in

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[6]/ The Fourth Circuit was not impressed by the means of solicitation to secure sales of the alcoholic beverages, stating:

> It makes no difference that the United States mail was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. . .

Adams Express, 219 F., at 800, citing In re Palliser, 136 U.S. 257 (1890); United States v. Thayer, 209 U.S. 39 (1908).

any manner used in violation of the state law.

Id. In conclusion, the court stated:

> This is a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce.

Id.

The import of this decision, and the strong language utilized by the Fourth Circuit Court of Appeals, was that the States had the right to stop the interstate sales and shipment of alcoholic beverages into their territories. There is nothing in the Adams Express decision to imply that the "forum" used by the States to clearly restrict the illegal sales of alcoholic beverages could "only" be the state courts.

The decision of the Eleventh Circuit Court of Appeals expressly bars the States from using federal courts in their never ending battle to control the sale, distribution manufacture and use of alcoholic beverages within their respective boundaries. Stated otherwise, while the Fourth Circuit recognized the clear "right of the state to prohibit the receipt or delivery as well as the possession and use of liquor," the Eleventh Circuit has barred the exercise of that right in a federal court. The Court of Appeals decision, thus, leaves in place the very situation the Fourth Circuit reasoned Webb-Kenyon was enacted to eliminate: the fact that "liquor dealers in one state [are] protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage."

The Petitioners would assert that the Federal Court may be the only forum in which to prohibit sellers like the Respondents from violating Florida law, especially in light of the Florida state trial court decision below. By not being able to directly enforce the Webb-Kenyon Act in the Federal Courts, Florida and the States lose the ability to reach the only party that can truly be stopped from violating State and Federal Law, the direct marketer/seller of alcoholic beverages. Unless the States can reach the Respondents, the Respondents are free to violate the law with impunity.[7]/

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[7]/ It is highly questionable that home state of the foreign seller will allow Florida to enforce its law in the home State's courts.

CONCLUSION

For these reasons, the requested Writ of Certiorari should be granted to review and reverse the instant decision of the Court of Appeal.

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